Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Carriage of the Transmissions of	)	CS Docket No. 98-120
Digital Television Broadcast Stations:	)	
Amendments to Part 76 of the	)	
Commission's Rules	)	
	)	

COURTROOM TELEVISION NETWORK LLC'S
OPPOSITION TO PETITIONS FOR RECONSIDERATION

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EXECUTIVE SUMMARY

The Commission should continue to stay the course in the face of broadcasters' demands for additional regulatory advantages in the form of dual carriage requirements and carriage of channels beyond the "primary" program stream. Broadcasters already enjoy spectrum they obtained for free, government-enforced cable carriage of at least one channel of programming, guaranteed access to the basic cable tier, freedom from having to pay for carriage on cable systems, and retransmission consent rights that give them leverage to obtain carriage of affiliated programming. No basis exists for the Commission to expand these regulatory perks by reconsidering its determinations in the *Second Report and Order*.

In the *Second Report and Order*, the Commission found that requiring carriage of the single "primary video signal" was sufficient to satisfy the core congressional objective the Supreme Court identified in *Turner Broadcasting System v. FCC*, *i.e.*, preventing broadcasters from losing so much audience share as to render infeasible continued service to non-cable viewers. The *Turner* Court did not hold that any must-carry rule that economically benefits broadcasters withstands First Amendment scrutiny. Rather, the Court upheld must-carry only insofar as it directly and materially advanced the specific interests Congress articulated in the 1992 Cable Act. Decades ago the Commission rejected the notion that broadcasters' profitability equals the public interest, yet that is the theory on which petitioners rely. There is no basis in this proceeding to resurrect this long-discredited view of the public interest.

The petitioners assert erroneously that the Commission failed to apply the proper constitutional analysis and that it used the wrong level of First Amendment scrutiny. Quite to the contrary, the Commission clearly applied intermediate and not strict scrutiny, correctly cited the appropriate factors, and carefully tracked the interests identified in *Turner*. In doing so, the Commission properly found that expanding must-carry would not advance the government's

interests in preserving free over-the-air television, promote widespread dissemination of information from a multiplicity of sources, or promote fair competition in the market for video programming. The Commission erroneously also considered whether dual carriage and multicast must-carry would help advance the digital transition and found that it would not. Given this conclusion, the error was harmless, but consideration of this issue as well as the other governmental interests the broadcasters proffer is not consistent with the purposes of must-carry as set forth in *Turner*. The Commission cannot expand must-carry requirements based on interests that were neither advanced by Congress nor approved by the Supreme Court.

Petitioners' claims that digital broadcasting will fail without the benefit of regulatory favors is incorrect. If they are left to play on a level playing field by the same rules as everyone else, the marketplace will work equally for the broadcasters who seek carriage for their multicast signals as it does for all other programmers. As shown by the voluntary agreement between the APTS and the NCTA, if broadcasters' offerings are as unique and/or as valuable as they claim, multichannel distributors will carry them because in a competitive market environment, consumer demand and quality programming will prevail.

Even though the Commission's finding that the proposed must-carry rules would fail to serve recognized governmental interests is a sufficient constitutional ground on which to reject them, the FCC also evaluated the burden must-carry would place on cable programmers. It found that the enhanced must-carry rights petitioners demand inherently disadvantage non-broadcast programming networks. The resulting burdens on programmers go well beyond the fact that, in a world of limited cable capacity, guaranteed "shelf space" for some programmers relegates others to second class status. Due to the retransmission consent rules, broadcaster-owned cable networks have tremendous – and unmatched – strength in contract negotiations

primarily as a result of their common ownership and without regard to the merits or consumer appeal of their networks. Cable programmers that lack broadcaster ties, on the other hand, must ensure that the content they offer is sufficiently compelling to merit carriage on cable systems and therefore they develop the unique kinds of programming that viewers desire. Guaranteed cable carriage enables broadcasters to occupy the same market niche as cable programmers but frees them from having to market their programming or negotiate for shelf space. This creates significant competitive advantages and enhances their distribution and advertising revenues.

Finally, petitioners themselves stray into strict scrutiny territory in their efforts to justify multicast must-carry based on programming content. By asking the Commission to adopt multicast must-carry based on the proposed format of multicast channels, broadcasters advocate content-based rules that clearly would not survive judicial scrutiny. The *Turner* Court expressly made clear that any content-based must-carry mandate would demand strict scrutiny and would be presumptively invalid.

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Courtroom Television Network LLC ("Court TV") herein opposes the petitions for further reconsideration in the captioned proceeding. [1] The Commission should deny the petitions because the *Second Report and Order* properly reaffirmed that, notwithstanding their transition to digital operation, broadcasters are entitled to mandatory carriage rights for only a single program stream under (i) the must-carry provisions of the Cable Act [2] and (ii) Supreme Court decisions narrowly upholding the constitutionality of must-carry in the analog context. [3]

Court TV applauds the FCC for staying the course in the face of broadcasters' demands for additional regulatory advantages in the form of dual carriage requirements for both analog and digital signals, and for multicast channels beyond the "primary" program stream. Broadcasters already enjoy the free use of valuable spectrum resources, government-enforced cable carriage of at least one channel of programming, guaranteed access to the basic cable tier, and

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[1] *Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, 20 FCC Rcd. 4516 (2005) ("*Second Report and Order*" or "*Second R&O*"), *aff'g Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, 16 FCC Rcd. 2598 (2001).

[2] *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460, §§ 614-615, *codified at* 47 U.S.C. §§ 534-535 ("Cable Act").

[3] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*").

freedom from having to pay for carriage on cable systems. *See Second Report and Order* ¶ 17 n.65. They also enjoy retransmission consent rights that the more powerful broadcasters can use to obtain carriage of affiliated programming that does not have must-carry status, including commonly owned cable networks that compete with those of other programmers who lack such regulatory advantages. Despite these many existing benefits, certain broadcasters have returned to the FCC for a third bite at the apple, taking the unusual step of seeking further reconsideration to urge reversal of eminently sound statutory and constitutional decisions.

I. THE COMMISSION STRUCK THE CORRECT BALANCE IN THE *SECOND REPORT AND ORDER*

As the *Second Report and Order* recognized, many of the broadcasters' arguments for expanded must-carry rights were repetitive the last time they sought reconsideration and/or responded to the Further Notice of Proposed Rulemaking. [4] Here, broadcasters all but admit that in many respects the instant petitions are an exercise in further repetition. [5] Throughout these protracted proceedings, Court TV has rebutted the broadcasters' redundant claims, [6] as have other commenters. In response to broadcasters' renewed demands, this Opposition focuses on issues that are not expansively addressed in the *Second Report and Order* but provide important reasons to sustain the Commission's action. Specifically, we describe the impact dual carriage

[4] *See*, *e.g.*, *Second R&O* ¶ 13 (summarily disposing of "arguments that the parties have presented" that were "essentially … no different from those that have previously been submitted, considered and rejected").

[5] Petition for Reconsideration of the National Association of Broadcasters and the Association for Maximum Service Television, Inc. ("NAB") at 5-6 (recapitulating and reasserting statutory arguments made in "extensive pleadings" earlier in the proceeding).

[6] Comments of Courtroom Television Network, CS Docket No. 98-120, Oct. 13, 1998, at 6-10 ("Court TV Comments"); Comments of Courtroom Television Network, CS Docket No. 98-120, June 11, 2001, at 12-18 ("Court TV FNPRM Comments"); Reply Comments of Courtroom Television Network LLC, CS Docket No. 98-120, Aug. 16, 2001, at 13-20 ("Court TV FNPRM Reply Comments").

and multicast must-carry would have on competition in the market for programming, and the corresponding burden they would impose on cable programmers. *See Turner II*, 520 at 214.

The *Second Report and Order* did not dwell on the anti-competitive impact of must-carry on non-broadcast networks. Instead, the Commission found that requiring carriage of the single "primary video signal" was sufficient to satisfy the core congressional objective examined in *Turner, i.e.*, preventing broadcasters from losing so much audience share as to render infeasible continued service to non-cable viewers. *See, e.g.*, *Turner I*, 512 U.S. at 634. Thus, it concluded that dual carriage and multicast must-carry were not necessary to preserve free over-the-air television or promote widespread dissemination of information from a multiplicity of sources. [7] Although the Commission did not "consider … in great detail" the competition-related interest cited in *Turner, id.*. ¶ 20, it recognized the anti-competitive impact of broadcasters' carriage demands which provides an independent reason to deny reconsideration.

To support its previous decisions it was not necessary for the Commission to demonstrate the burdens of dual or multicast must-carry. Since such expanded carriage rights could not advance the Act's statutory interests, *id*. ¶¶ 15-22, 37-39, the Commission concluded that *any* restriction on cable speech would be unconstitutional due to the poor fit between the rule's benefits and burdens. [8] In this regard, the relevant inquiry is not, as broadcasters assert, the

[7] *See Second R&O* ¶¶ 18-19, 38-39. Indeed, with respect to promoting dissemination of information, the Commission properly found that guaranteeing additional channels on cable systems to the same speaker, as would be the case with dual carriage and multicast must-carry, not only fails to enhance diversity (speaker or viewpoint), it "would arguably diminish [diversity by impeding] the ability of other, independent voices to be carried on the cable system." *Id*. ¶ 39.

[8] *See, e.g.*, *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 183 (1999) (if burden on speech not balanced by advancing of statutory objectives, even minor speech restrictions violate the First Amendment); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001), ("no *de minimis* exception for a speech restriction that lacks sufficient tailoring or justification").

amount of cable system capacity dual carriage and multicast must-carry would occupy relative to overall system capacity.[9] Rather, the true burdens of must-carry are the ways that, without regard to capacity, the rules give broadcasters an undeserved competitive leg up, and put cable programmers at a competitive disadvantage. Such burdens would be magnified in any dual carriage or multicast must-carry scenario, regardless of cable system capacity.

These burdens are of surpassing importance, as the touchstone for petitioners' arguments continues to be the mistaken proposition that any must-carry rule that "bolsters the economic vitality" of broadcasters is statutorily required and constitutionally defensible.[10] But as the Commission correctly recognized, "the focus of the government interest in *Turner* is not the economic health of broadcasting per se." *Second R&O* ¶ 18. The notion that profitability equals the public interest was rejected decades ago when the FCC jettisoned the long-discredited "Carroll Doctrine." Under this doctrine, a broadcaster could impede the initial licensing of competitors simply by showing the detrimental economic effect on an incumbent licensee of the proposed new station. *Carroll Broad. Co. v. FCC*, 258 F.2d 440 (1958). After maintaining the policy for 30 years, the Commission found not a single instance where Carroll Doctrine allegations led to denial of a new station's license. Accordingly, it eliminated the doctrine, finding that the public interest was disserved by a policy that does nothing more than protect broadcasters'

[9] NAB at 11, 14; Petition for Reconsideration of the ABC Television Affiliates Association, CBS Television Association, NBC Television Affiliates, ABC Owned Television Associations, NBC and Telemundo Stations ("Joint Network Petitioners") at 1516. *See also* NAB at 10-15.

[10] Joint Network Petitioners at 9. *See also* id. at 7 ("multicasting will enhance the health of local broadcast services"); NAB at 19 ("Commission refused to consider the unrefuted record evidence that lack of carriage of broadcasters' multicast streams would imperil the financial health of local broadcasters").

economic self-interest.[11] The Commission found the economic theory on which the Carroll Doctrine was based was flawed and that the policy was routinely employed by incumbent licensees to forestall competition. *Id*. at 640. Of course this is exactly what broadcasters are trying to accomplish with respect to competing programmers on cable systems by seeking expanded carriage rights.

Contrary to petitioners' assumptions, the *Turner* Court did not hold that any must-carry rule that economically benefits broadcasters withstands First Amendment scrutiny. Rather, it upheld must-carry only insofar as it directly and materially advanced specific interests Congress explicitly stated and supported with extensive factual findings.[12] Congress sought to ensure that broadcasters would have sufficient opportunity to reach enough households that viewers without cable would still have access to over-the-air television. *See Turner I*, 512 U.S. at 646 ("Congress' overriding objective" was "to preserve access to free television programming for … Americans without cable."). A bare majority of the Supreme Court found this rationale to be sufficient to support single-channel must-carry only after a lengthy, granular analysis that narrowly focused on the extent to which must-carry advanced the three specific interests that Congress identified: (1) preserving the benefits of local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming. *Turner II*, 520 U.S. 195-213. The Commission conducted a similar analysis in this proceeding, and additional review would only

[11] *Policies Regarding Detrimental Effects of Proposed new Broadcast Stations on Existing Stations*, 3 FCC Rcd 638, 639-41 (1988), *affirmed*, 4 FCC Rcd 2276 (1989).

[12] *Turner II*, 520 U.S. at 189; *id*. at 187, 199 (Congress considered "years of testimony" and "volumes of documentary evidence and studies offered by both sides"); *Turner I*, 512 U.S. at 632, 646, 649, 662 (repeatedly attesting to "extensive record" compiled by Congress in support of analog must-carry). *Accord* Joint Network Petitioners at 1 (citing "extensive factual findings and policy conclusions" behind the Cable Act's must-carry provisions).

confirm that dual carriage and multicast must-carry would not promote fair competition and would unduly burden cable speech. Consequently, further reconsideration must be denied.

II. MUST-CARRY INHERENTLY DISADVANTAGES CABLE PROGRAMMERS LIKE COURT TV; EXPANDING BROADCASTER RIGHTS FOR DTV WOULD EXACERBATE COMPETITIVE IMBALANCES

The impact of dual carriage and multicast must-carry on competition and their resulting burden on cable speech plainly precludes awarding the expanded carriage rights that broadcasters seek. There is no doubt that "at [its] heart," must-carry is intrinsically unfair because it establishes "preferences" among speakers. *Turner I*, 512 U.S. at 679 (O'Connor, J., concurring in part and dissenting in part). "Broadcasters, which transmit over the airwaves, are favored, while cable programmers, which do not, are disfavored." *Id*. at 645 (majority decision). Nevertheless, the Supreme Court narrowly permitted this preference on grounds that the majority found were "not a subtle means of exercising a content preference," because it believed carriage of one signal for each broadcaster was narrowly tailored to advance specific, content-neutral government interests. However, that limited holding does not change the essential unfairness of must-carry requirements – an inequity that the petitioners seek to expand in this proceeding. [13]

In a world of limited cable capacity, the guaranteed "shelf space" for broadcasters necessarily puts pressure on other programmers who lack the same regulatory advantages. Every additional cable channel that broadcasters secure for dual or multicast carriage in a finite-capacity structure means someone else who could have occupied the channel is displaced. But that possibility only scratches the surface of the real disadvantage at which expanded must-carry

[13] *Id*. at 645; *Turner II*, 520 U.S. at 214. We address the extent to which attempts to base expanded carriage rights on the asserted meritorious programming of broadcasters, and the extent to which such carriage does not speak to the interests enunciated in *Turner* in Section III below. We note here, though, that were even single-channel must-carry considered on a clean slate today, a different outcome might be warranted given the evolution of the market and technology of video programming and other relevant changes that have occurred since *Turner*.

rights place cable programmers. Independent networks without broadcast affiliation, such as Court TV, compete with dozens of other cable and broadcast networks for distribution on cable systems, advertising dollars, and viewers. As Court TV recently explained, though it has achieved wide distribution and ratings milestones, it has done so more slowly and at a significantly higher cost as a direct result of retransmission consent.[14] Those rules have allowed broadcast networks to roll out numerous new cable networks and guarantee those networks carriage as a result of must-carry and retransmission consent agreements in which cable operators have little real leverage. Due to the inequity of the rules, these broadcaster-owned cable networks have tremendous – and unmatched – strength in contract negotiations primarily as a result of their common ownership.

The same will be true of broadcasters' multicast channels and their duplicative digital feeds, especially if they use the "main" digital feed for HDTV duplication of their primary programming. Because of this regulatory advantage, expanded carriage rights would serve only to reinforce that leverage. Moreover, since distribution and ratings are critical to advertising revenues, and since ratings depend on viewers, dual or multicast must-carry provides a further unfair advantage to broadcasters by giving them multiple marketing platforms on which to cross-promote their programming.

Must-carry rights in general, and their expansion to additional broadcast program streams in particular, disadvantage independent programmers in a variety of ways. As a threshold matter, broadcast channels entitled to must-carry rights need only knock on a cable company's

[14] *See* Letter from Robert Rose, Executive Vice President, Affiliate Relations, Courtroom Television Network LLC, to Marlene H. Dortch, Secretary, FCC, RM-11203, filed April 18, 2005, at 2-4. *See also*, *e.g.*, Comments of the American Cable Association, RM-9832, filed April 21, 2003, at 6; Comments of the American Cable Association, CS Docket No. 98-120, filed June 8, 2001, *passim*; Petition for Rulemaking of the American Cable Association, RM-11203, filed March 2, 2005, *passim*.

door and announce that they want carriage; that is the beginning and the end of their quest for placement and retention on cable systems. Such regulatory leverage insulates them from a host of market pressures that independent programmers face every day. For example, broadcasters that enjoy a must-carry preference can never be required to pay for carriage, and in fact are statutorily barred from doing so, *see* 47 U.S.C. § 614(b)(10), while there is no legal impediment whatsoever against demands for such payment by other programmers. They also cannot be required to trade commercial time in their programming to cable operators for their use to sell local ads or promote their own services, as cable programmers often must do to obtain carriage.

Non-broadcasters' networks that lack carriage rights and retransmission consent tie-ins face the marketplace reality of having to pay per-subscriber launch fees and marketing support to obtain carriage. Such expenditures can range to upward of several dollars per subscriber. *E.g.*, Court TV FNPRM Reply Comments at 3. Even once carriage on a cable system is secured, a cable network must constantly promote its product to ensure that it maintains enough viewer demand to forestall being replaced by other programmers' offerings, whereas broadcasters never face that risk. With cable operators increasingly offering services above the basic tier in program packages, a cable programmer must convince consumers to purchase the tier that includes its programming, while broadcast channels blessed with must-carry status are assured placement on the basic tier (to which subscription is a threshold requirement to receive any cable service). 47 U.S.C. § 543(b)(7)(A).

The competitive advantages and disadvantages respectively experienced by broadcast channels with must-carry status and cable programmers affect the market for programming as well. As a threshold matter, broadcasters need not ensure that the content offered on channels entitled to must-carry rights is sufficiently compelling to merit carriage on cable systems. This

can relieve them of the costs of researching and developing the kinds of programming that viewers desire and identifying audiences that might be underserved by existing fare, while independent cable programmers must invest heavily in this regard. Perhaps most perniciously though, the guarantee of carriage allows broadcasters to occupy the same market niche as cable programmers, secure in the knowledge that if a cable operator finds its system is duplicatively carrying channels that are economic substitutes, it will delete the cable programmer and not the broadcaster with its regulatory protection.

In this regard it is significant that programming has been proposed for some multicast channels that would directly compete with formats currently offered by Court TV and other independently owned cable programmers. For example, NBC will reportedly offer a crime channel, which it describes as an outlet for some of its existing shows. [15] Similarly, in an effort to show their multicast offerings warrant mandatory carriage, petitioners describe their plans for local and national weather channels, foreign-language offerings, children's programming, and local news channels, among others. [16] Such programming would compete directly with programmers such as The Weather Channel, Univision, and the various local origination news outlets offered by cable operators.

While the proposed programming formats may well have merit, that value has been created by cable networks that have devoted years and spent millions of dollars to develop these unique concepts, produce programming, and market their channels. It has been a long time since the FCC has been in the business of protecting program formats, *see, e.g.*, *WNCN Listeners*

[15] *E.g.*, *NBC Eyes Big Ideas: VOD, DTV Multicast*, Broadcasting and Cable, Oct. 13, 2003, at 1, 44 ("'It sounds more like justification to grab the must-carry real estate from cable than a business plan,' said the CEO of one cable operator.").

[16] *See* Joint Network Petitioners at 10, 14, 20-22; NAB at 3, 21-24; Petition for Reconsideration of DIC Entertainment Corporation ("DIC"), *passim*.

Guild v. FCC, 450 U.S. 582 (1981), and unlike broadcasters, Court TV has no expectation of receiving regulatory "goodies" such as must-carry or retransmission consent that would allow it to avoid competition. Court TV believes in the value of its programming and is more than happy to compete on a level playing field with any programmer. But it would hardly be a "level" playing field if, despite superior programming, marketing, innovation and other similar efforts, cable programmers like Court TV cannot prevail in competition because expanded must-carry rights are granted. This is the endgame of the instant petitions for further reconsideration, and the Commission should not allow it to succeed.

At the end of the day, once must-carry and other rules underlying the digital transition have been finalized, the marketplace will work for broadcasters who seek cable carriage for their multicast signals just as it has for other programmers who are willing to compete. Accordingly, there is no merit to the concern that, "without a carriage requirement, many cable operators will *not* carry multicast services." Joint Network Petitioners at 17 (emphasis in original). If the broadcasters' offerings are as unique and/or as valuable as broadcasters claim they will be, *see supra* note 16 and accompanying text, cable operators will carry them because in a competitive market environment, consumer demand and quality programming will prevail. The recent voluntary agreement between the Association of Public Television Stations and the NCTA for carriage of public broadcasters' multicast programming demonstrates such agreements are possible and that similar agreements with individual commercial broadcasters will proliferate in a free market, *if the broadcasters' offerings are sufficiently compelling*.[17] The FCC should not

[17] *See Second Report and Order* ¶ 38. Though broadcasters minimize its significance, the PBS-NCTA Agreement demonstrates cable operator willingness to carry DTV offerings that offer something new or unique, or for which there otherwise is public demand. So, too, does the carriage accorded commercial DTV offerings. *See id*. *See also, e.g.*, Dick Kreck, *Channel 9 Storms Into Around-the-Clock Weather*, DENVER POST, May 23, 2005, at F9 (describing NBC

remove that incentive with expanded must-carry rights and accordingly should deny the instant petitions.

III. THE COMMISSION'S CONSTITUTIONAL ANALYSIS IN THE *SECOND REPORT AND ORDER* IS SOUND

The anti-competitive impact of the dual carriage and multicast must-carry rules sought by broadcasters and the record evidence analyzed in the *Second Report and Order* preclude any grant of further reconsideration. The Commission properly found that dual carriage and multicast must-carry would not advance the government interests in preserving free over-the-air television, nor promote either widespread dissemination of information from a multiplicity of sources or fair competition in the market for video programming. *Second Report and Order* ¶¶ 14-22, 37-39 (following *Turner II*, 520 U.S. at 189-213). With respect to the burden that expanded carriage rights would entail, the Commission's analysis was properly focused and correctly decided, because it did not depend upon a quantitative analysis of cable system capacity and instead acknowledged the "unfairness to cable program networks" that must-carry represents. *Id.* ¶ 32. The Commission rightly maintained a content-neutral view of the "policy debate over carriage of digital stations" *id.* ¶ 10, and in doing so, properly applied intermediate scrutiny to reject dual carriage and multicast must-carry. It must stay this course notwithstanding the broadcasters' invitation to let government "favoritism … towards the underlying message" of their programming be a motivating purpose for expanded must-carry rights. *Turner I*, 512 U.S. at 642.

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affiliate Channel 9 Weather PLUS offering of up-to-the-minute 24/7 forecasts on Comcast Channel 249, and Channel 247 that has been on Comcast since November 2004 providing Colorado's first 24-hour local weather channel). *Cf. id.* (noting extent to which local broadcaster "weather channels" will compete with The Weather Channel).

A. The Commission Properly Limited its Analysis to Interests Identified in *Turner*

The Commission should reject the broadcasters' claims that it "failed to consider" any so-called "important aspect" of whether dual carriage or multicast must-carry would advance the government interests expressed in the Cable Act or "how the record … in this proceeding related to th[e] interests" the Supreme Court identified in *Turner*. NAB at 17. It is clear on the face of the *Second Report and Order* that the Commission's constitutional analysis adhered closely to the *Turner* framework. [18] Once one cuts through the petitioners' hyperbole, the source of their complaints about the Commission's analysis is twofold. [19] First, the broadcasters disagree with the Commission's predictive assessment of whether duplicative dual carriage of a broadcaster's analog and digital "primary" program stream, or requiring carriage of additional multicast streams, would advance the three *Turner* interests. *See* NAB at 16-20; Joint Network Petitioners at 7-11. But the mere fact that a party disagrees with an agency in this manner is not grounds for reconsideration where, as here, the Commission's judgments are reasonable. [20] Second, the

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[18] *See Second Report and Order*, ¶ 16-22; 38-39. Indeed, the Commission's dual carriage constitutional analysis contains specific sections dedicated to each of the three interests the *Turner* Court examined complete with pointheadings reciting each interest practically verbatim, and the constitutional multicast must-carry analysis follows a similar pattern as well. *See id*.

[19] Of course, overlying the two chief sources of the broadcasters' ire is their mistaken belief that any financial or regulatory benefit they can realize from a must-carry rule is sufficient to justify it from all perspectives – whether it be policy, statutory or constitutional. *See supra* at 3-5.

[20] *See Time Warner Entm't Co., L.P. v. FCC*, 240 F.3d 1126, 1133 (D.C. Cir. 2001) (FCC is entitled to "deference to predictive judgments that necessarily involve the expertise and experience of the agency") (citing *Turner II*, 520 U.S. at 196); *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 300 (2003) (same). In this regard, the Commission correctly found carriage of a single "primary video signal," as already required by the must-carry rules, suffices to avoid broadcaster losses of audience share that would make it impossible to sustain quality television service to non-cable viewers. *See Second Report and Order* ¶¶ 18, 20, 38. *See also Turner I*, 512 U.S. at 634. With respect to competition, admittedly the Commission did not "consider this … in great detail", *Second Report and Order* ¶ 20, but the considerations in Section II above would preclude "advocates of [expanded] carriage" from satisfying "the[ir] burden … to

broadcasters are convinced reconsideration is warranted because "the Commission failed to take into account other government interests in addition to those enumerated in *Turner*." [21] However, that position is both inaccurate and legally indefensible.

As a threshold matter, the Commission did consider an interest in addition to those enumerated in *Turner*. It explored whether dual carriage and multicast must-carry would help advance the digital transition. *Second Report and Order* ¶ 23-25, 40. While this was improper, the Commission was unpersuaded by even this additional ground for expanding carriage rights. Nevertheless, the important point is this: consideration of advancement of the digital transition, and the other additional interests the broadcasters proffer, such as such as "clearing spectrum for public safety services," NAB at 17 n.38, lessening "viewer disenfranchisement at the end of the transition," reclaiming analog broadcast allotments to "raise billions by auctioning the surrendered spectrum," or bolstering "localism," Networks at 12-13, are not consistent with the purposes of must-carry that Congress articulated. *See Turner II*, 520 U.S. at 190-191. The Commission cannot justify dual carriage or multicast must-carry based on these additional interests that were neither advanced by Congress, been the subject of *any* legislative findings (let alone those as "extensive" as relied upon in *Turner*, *see supra* note 12), nor approved by the Supreme Court. [22]

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prove … competitive necessity" of dual carriage and multicast must-carry. *Id* ¶ 22. It does not enhance diversity to guarantee broadcasters access to multiple cable channels via dual or multi-cast must-carry since it "would not result in additional sources of programming" but rather does so from the same sources that already have carriage. Expanded must-carry requirements would diminish diversity by impeding "the ability of other, independent voices to be carried." *Id*. ¶¶ 19, 39.

[21] Networks at ii, 12-13; NAB at 17 n.38.

[22] *See, e.g.*, *Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1069 (10th Cir. 2001) (holding that it is impermissible to "supplant the precise interests put forward by the State" in First Amendment analyses) (quoting *Edenfield v. Fane*, 507 U.S. 761, 768 (1993). In this regard,

B. The Commission's Burden Analysis Properly Eschewed Cable System Capacity Considerations

Petitioners claim incorrectly that the *Second Report and Order* contained "no assessment of … [the] actual burden" that dual carriage and multicast must-carry would entail.[23] Although the Commission did not place great weight on cable system capacity or compare the relative capacity requirements of analog must-carry to those necessary for a dual and/or multicast carriage, such considerations are not the only burdens at issue. *Compare, Second R&O* ¶ 10 n.35 *with id*. ¶ 27 (finding that cable systems might accommodate dual carriage, but rejecting it nonetheless). In light of the unfair and anti-competitive efforts described in Section II above, it is wholly erroneous for petitioners to assert that "[c]arriage of all local digital signals would not … have any material impact on cable speech." NAB at i.

It is arguable that no burden analysis whatsoever was required, in that the Commission found neither dual carriage nor multicast must-carry would advance the government's interests specified in *Turner* (or in advancement of the digital transition). *See supra* at 3. In any event, as the Supreme Court explained, the true burden of must-carry is that, *inter alia*, it makes "it more difficult for cable programmers to compete for carriage."[24] The broadcasters agree with this assessment, NAB at 3 ("the core premise of *Turner* [was] that must-carry obligations could

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the Commission's error in considering advancement of the digital transition as a possible government interest in the *Second Report and Order* is harmless since it did not lead to the imposition of expanded carriage rights. Any other outcome, however, would be extremely susceptible to First Amendment challenge.

[23] NAB at 12. *See also id*. at 16 (FCC did not "ever examin[e] an issue [previously] deemed crucial – the actual 'burden' … proposed carriage requirements would have on cable"). *Cf. id*. at 10-15; Networks at 15-16 (both proffering quantitative analysis of cable system capacity and how much of it would be occupied by channels under dual carriage and multicast must-carry).

[24] *Turner II*, 520 U.S. at 214 (quoting *Turner I*, 512 at 637) (internal quotes and edits omitted).

materially burden speech"), but reach the wrong conclusion because they focus exclusively on the quantitative impact of must-carry on cable system capacity. *See e.g., id.* at 11. The Commission, on the other hand, engaged in a proper analysis of the extensive record demonstrating the severe anti-competitive impact that additional rights for dual carriage and multicast must-carry would have on cable programmers like Court TV.

C. The Commission Did Not Apply Strict Scrutiny, But Will Have to Do So if it Accepts Broadcaster Justifications for Multicast Must-Carry

Neither the broadcasters' assertions that the Commission engaged in strict scrutiny nor their effort to underscore the merit of the existing or proposed content on their multicast channels support reconsideration of the Commission's constitutional analysis. *See Second Report and Order* ¶¶ 14-22, 37-39. With respect to the applicable test, *see* NAB at 9-11; Networks at 4-6, there is no doubt that the Commission applied intermediate scrutiny as outlined in *Turner* under the standard established in *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968). The Commission explicitly stated it was applying intermediate scrutiny as the appropriate standard and correctly applied the test's factors. *Second Report and Order* ¶ 15. In this regard, its analysis carefully tracked the interests identified in *Turner*.[25] There were no other indicia of strict scrutiny, including inquiry whether the rules would be the least restrictive means of achieving must-carry's statutory objectives.[26] It appears the broadcasters' real complaint is that when the

[25] Because the Commission expressly analyzed the interests relied upon in *Turner*, it necessarily examined government interests that were held only to be "substantial," *e.g., Turner I*, 512 U.S. at 663-64, not "compelling" as would be required in strict scrutiny. *See, e.g., United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000).

[26] *See, e.g., United States v. American Library Ass'n*, 539 U.S. 194, 207 (2003). The broadcasters' claims that the Commission applied strict scrutiny, which come down to the mere fact that the Commission used words such as "necessary" and "essential," *see, e.g.*, NAB at 9 (citing *Second R&O* ¶¶ 15, 22, 24, 25, 37, 38, 41; Networks at 5 (citing *Second R&O* ¶¶ 38, 41), are unpersuasive since such words appear in a variety of must-carry contexts having nothing to do with application of strict scrutiny, not the least of which include the Supreme Court's *Turner*

Commission applied intermediate scrutiny, it actually gave the test some teeth. But this is not a valid criticism of the decision considering the recent trend of cases in applying the intermediate scrutiny standard. [27]

Ironically, Petitioners stray into strict scrutiny territory by seeking to justify multicast must-carry based on programming content. By asking the FCC to adopt multicast must-carry based on the merit of various types of programming, broadcasters advocate content-based rules that cannot be squared with *Turner*. In this regard the broadcasters claim that the Commission should grant multicast must-carry rights because their multicast channels either do, can, or some-day will offer valuable programming. [28] The promised formats include news, weather and travel information, local alerts, programming in Spanish and for other non-English speaking and other

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decisions. *E.g.*, *Turner I*, 512 U.S. at 665-66; *Turner II*, 520 U.S. at 211. *See also* 47 U.S.C. § 534(b)(4)(B) (discussing "changes in … carriage requirements" that are "*necessary* to ensure … carriage of … stations which have been changed") (emphasis added); *Second Report and Order* ¶ 15 (intermediate scrutiny requires that rules "not substantially burden more speech than is *necessary* to further the government's legitimate interests") (paraphrasing *U.S. v. O'Brien*, 391 at 377) (emphasis added).

[27] *N. Olmsted Chamber of Commerce v. City of N. Olmstead*, 86 F.Supp.2d 755, 770 (N.D. Ohio 2000) ("the Supreme Court's recent cases have given extra bite to … intermediate scrutiny"). *See also Lorillard*, 533 U.S. at 528 (government must "carefully calculat[e] the costs and benefits [of] the burden on speech,"); *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 371, 374 (2002) (government must "prove [a] regulation directly advances [its] interest and is not more extensive than necessary to" do so and if it can "achieve its interests in a manner that … restricts less speech, [it] must do so") (internal quote and citation omitted). *Cf. Turner I*, 512 U.S. at 641 (applying intermediate scrutiny "[b]ecause the must-carry provisions impose … special burdens upon cable programmers [so] some measure of heightened First Amendment scrutiny is demanded"); *Turner II*, 5201 U.S. at 252-53 (O'Connor, J., dissenting).

[28] Admittedly, Court TV has suggested that the FCC "requir[e] broadcasters to provide hard data on their actual efforts to offer multicast programming," but at no point has it ever suggested the program *content* is a permissible line of inquiry; rather, data on actual multicasting efforts is a "prerequisite to the contemplation of must carry rules" due to the threshold question whether it merits even considering the question at all, and to place it in the proper context of the "competitive imbalance fostered by must carry mandates and retransmission." Comments of A&E and Court TV, MB Docket No. 03-172, filed Sept. 11, 2003, at 15-16.

minorities, children's programming, and programming on minority health issues, *see supra* note 16, as well as religious and "multicultural" programming, and programming that assertedly will "better serve audiences" to the extent the FCC imposes "clear public interest obligations and programming decency standards." [29] Regardless of whether broadcasters purport to offer such programming of their own volition, in response to "two Commissioners [who] expressed concern that commercial broadcasters may fail to provide public interest programming in their multicast networks," [30] or in an effort to have the Commission "recalibrate" its analysis with the outcome of its inquiry in *Public Interest Obligations of TV Broadcast Licensees*, 14 FCC Rcd. 21633 (1999) ("*DTV Public Interest NOI*"), [31] such an approach would impermissibly enmesh the FCC in awarding a regulatory benefit grounded in content-based preferences in clear violation of the First Amendment.

The *Turner* Court expressly made clear that any content-based must-carry mandate would "demand strict scrutiny" and would be presumptively invalid as it would "reflect the Government's preference for the substance of what … favored speakers have to say." *Id*. at 658. In

[29] Petition for Reconsideration of Paxson Communications Corp. at 3-4, 6-7; Minority Media and Telecommunications Council/Hispanic Technology and Telecommunications Partnership Joint Petition for Partial Further Reconsideration, *passim*. To be sure, much or even all of the programming cited by the broadcasters may be valuable, as is the programming that results from extensive cable public interest programming. Court TV Comments at 2-6; Court TV FNPRM Comments at 9-11. *See also, e.g.*, Comments of Cablevision Sys. Corp., CS Docket No. 98-120, June 11, 2001; Comments of America's Health Network, *et al.*, CS Docket No. 98-120, filed Oct. 13, 1998, at 8-11; Comments of Citizens for C-SPAN, CS Docket No. 98-120, filed Oct. 13, 1998, *passim*. *See Turner I*, 512 U.S. at 681 ("even assuming, *arguendo*, that the Government could set some channels aside for educational or news programming, the Act … equally burdens channels with [legitimate] claim … to being educational or related to public affairs") (O'Connor, J., concurring in part and dissenting in part). But this does not mean that granting must-carry rights to secure that value would pass constitutional muster.

[30] Networks at 20 (citing *Second Report and Order*, Separate Statement of Commissioner Jonathan S. Adelstein; *id*., Separate Statement of Commissioner Michael J. Copps).

[31] *See* NAB at 16-24; Networks at 20-24 (both citing *DTV Public Interest NOI*).

fact, the only thing the Court unanimously agreed on was that if the Act's must-carry provisions were content-based they would be unconstitutional. [32] Were the FCC to grant reconsideration in exchange for the broadcasters' programming promises, or even with the implicit expectations that the broadcasters would follow through on them, it would represent "a regime where … the FCC exercised more intrusive control over the content of broadcast programming" entitled to must-carry status than the First Amendment can bear. *See Turner I,* 512 U.S. at 652.

CONCLUSION

For the reasons discussed herein, the Commission should dismiss the petitions for reconsideration filed against the *Second Report and Order* in this proceeding.

Respectfully submitted,

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[32] *See Turner I*, 512 U.S. at 642-43, 669 (Stevens, J., concurring), 676-84 (O'Connor, J., concurring in part and dissenting in part); 685-86 (Ginsburg, J., concurring in part and dissenting in part). *See also* Ted Hearn, "The Real Story Behind Must-Carry," *Multichannel News,* March 22, 2004 (describing deliberations by the Justices in *Turner* as to whether the must-carry rules were content-based and whether strict scrutiny should apply.).

CERTIFICATE OF SERVICE

I, Nancy R. Alpert, hereby certify that copies of the foregoing "Courtroom Television Network LLC's Opposition To Petitions For Reconsideration" were sent by first-class mail on this 26th day of May 2005, to the following:

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